

February 18. 1767.

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A N S W E R S

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Henry Belfrage of Wester Conland, and others,

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The PETITION of James Bogie, late tanner in
Leslie, and others.

IN the year 1733 the secession from the church of Scotland begun, chiefly upon this ground, of the Seceders considering the law of patronage to be an intolerable grievance. They therefore resolved to have pastors of their own chusing, and to be ruled in religious matters by what is called their *act and testimony*; which asserts the divine right of the people to chuse their own ministers.

In the year 1740, a number of people of that opinion residing in the neighbourhood of Leslie, resolved to build a meeting-house for their public worship. With that view they raised voluntary contributions, both from themselves, and others of that persuasion. With part of this money they purchased an area, and some old houses upon it, in the town of Leslie, at the price of 1200 merks. The disposition from the seller was taken to the respondent Henry Belfrage, and the petitioner James Bogie; and upon which they were infected.

The intended house was afterwards built upon part of the
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ground by contribution, in the same manner that the price had been paid. An exact account of those contributions was kept in regular books, called their *session* or *managers* books; these managers having the direction or regulation of the whole matter. Some money was likewise borrowed, which has been since paid by the respondents all to a mere trifle.

The meeting-house being finished, Mr John Erskine was, in June 1743, unanimously called by this associate congregation to be their minister. The call was signed by 117; of which there are twenty-six since dead, and sixty-one still attend the meeting-house; sixteen of the petitioner's party are removed to distant places, and only ten of them remain in the neighbourhood of Leslie.

Mr Erskine being settled, the seats in the house were let to different people, and the rents applied for payment of the minister's stipend. About the same time it was proposed, that Belfrage and Bogie should declare the trust they held, and secure the house in such a manner, as to be solely applicable to the purpose which the contributors had in view, in purchasing and building as aforesaid.

Accordingly, in April 1744, a tack was made out; whereby Belfrage and Bogie, as heritable proprietors of the subjects, let the same to twelve persons, their heirs, subtenants, and assignees, for the space of ten nineteen years, the tacksmen being bound only to relieve them of all repairs and public burdens. An obligation was likewise intended to be granted by Belfrage and Bogie, referring to the tack, and obliging themselves to denude of the property in favour of any persons named by the majority of the said *twelve* tacksmen, and of themselves two jointly. These deeds, however, were not completely executed: the tack was only signed by *eight* of the tacksmen; and both it and the obligation remained undelivered evidents, and were never finally settled and approved of by the parties concerned.

On this footing matters went on for some time with unanimity;



nimity; but in the year 1747, some people took it into their heads to impose the burghs-oath upon the whole members of the secession, as an article of religion. This oath bears, "That I profess and allow, with my heart, the true religion, presently professed within this realm, and authorised by the laws thereof," &c. As patronages stood established in Scotland ever since the act of the 10th of Queen Anne, it appeared to the respondents, that this oath bound the taker to support the patron's right; and was therefore inconsistent with the fundamental principles of the secession.

For these reasons, Mr Erskine the minister, with the respondents, and almost the whole congregation in question, resolved to reject that oath. The consequence of this was, that the now petitioners, who are *seven* of the persons that had been named in the incompleted deeds above mentioned, after failing in their endeavours to force the said burghs-oath upon the congregation, seceded, and withdrew from them and the meeting-house altogether.

This disturbance about the burghs-oath having extended through Scotland, occasioned considerable heats. The associate synod, consisting of the ministers and elders of the original secession, in respect that some ministers who had belonged to them did teach the propriety of the oath, they held it dangerous to continue in communion with them; and therefore excommunicated those ministers, and possibly among the number Mr Erskine's father: but the respondents believe, that Mr Erskine had no concern in that measure, nor was present at the synod when it happened.

To return to the petitioners: When they had thus withdrawn from the congregation, they lay by for some years, without publicly molesting their brethren: But in the 1752, they commenced the present action against the respondents before the sheriff of Fife, libelling on the foresaid tack and obligation, that had never been completed; and concluding to have it found, that they had thereby right to the one half
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of the foresaid subjects, and rents thence arising ; that the respondents should be decerned to pay them rent accordingly during their possession ; and that, as the subjects could not be divided, they should either be sold by roup, and the price divided, or else that the same should be valued, and the one party ordained to purchase from the other.

After some proceedings before Mr Leslie, then sheriff of Fife, the cause was advocated, and thereupon dropt by the petitioners, who did not move a step in it for above a dozen of years thereafter ; during which time the meeting-house, and management of it, was carried on by the respondents upon its original footing. They paid off considerable sums that had been borrowed, to supply the deficiencies in the contributions for erecting the house ; they likewise paid all the public burdens ; and bestowed above L. 50 on repairs, particularly in furnishing a new roof in the 1758. As for the seat-rents, they have been all along applied in the way to which they were originally destined, namely, the support of the minister.

However, in the 1762, being ten years after the present process was thought to have been dropt, the now petitioners, (excepting Mr Bogie), supposing that, by alteration of circumstances, they had got upon their side a majority of the fourteen persons named in the foresaid incomplete tack and obligation, thereupon brought a new action in this court against the respondent Henry Belfrage and Mr Bogie, for having them decerned to denude of the subjects in their favour. In that process, the declaration and assignment after mentioned granted by Mr Bogie, the joint proprietor and trustee with Mr Belfrage, in favour of one of the respondents, was produced, although he was afterwards prevailed on to declare in favour of the petitioners. Others of the pretended tacksmen likewise gave declarations of their adherence, sometimes to the one side, sometimes to the other. But as it clearly appeared, that the tack and obligation had never been complete or effectual

fectual deeds, and that the congregation was still continued by the respondents upon its original footing, your Lordships, upon report of *Lord Alemoor*, on the 12th July 1764, were pleased to "assailzie the respondents, and find the pursuers liable to them in the expence of extract." Decreet was extracted accordingly; but the expence of it has never yet been recovered from the petitioners, owing to *Mr Bogie*, who was called as a defender, having refused either to assign his interest, or to concur in a discharge.

The petitioners, who are seven persons in number, having thus failed to eject the respondents, minister and congregation, altogether, did afterwards, to the respondents surprise, waken and insist before *Lord Kames* in the old process, which had been advocated from the sheriff of Fife in the 1752; and his Lordship, on the 2d July last, was pleased to pronounce an interlocutor in these words. "The Lord Ordinary, upon advising these minutes, with the foregoing steps of the process; considering that the house in question was erected for public worship, and that the pursuers never have been excluded from using it for that purpose, in conjunction with the defenders, finds there is no foundation for this process; and therefore dismisses the same, finds expences due, and allows the defenders to give in an account of their expences."

To this interlocutor the Lord Ordinary adhered by two subsequent interlocutors; and the petitioners now reclaim, and insist for an alteration, on these grounds: *1mo.* That they are excluded from the use of the meeting-house by the respondents, without getting either retribution of the expences they have been at upon it, or relief of the engagements under which some of them still stand for part of the price. And, *2do*, That in point of law they must be considered as a private society, without a perpetual succession; and that having a common property in the subject, the same must be

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divided betwixt them and the respondents, in one or other of the methods suggested by them.

With respect to the first of these reasons, it is believed your Lordships will not incline to go deep into the merits of it, as being rather a matter of a religious than of a civil nature. At the same time the respondents will be permitted to observe, in the way of their own justification, that the petitioners were the aggressors, by endeavouring to force upon the respondents, the body of the congregation, and the minister, an oath which they held to be inconsistent with the original principles of the Secession. Again, if the ministers of the petitioners opinion were excommunicated by those who differed from them, the respondents are not answerable for it; and if the petitioners imagine that the said excommunication extends to them, (which, it is believed, it does not), they may certainly be reponed, upon returning to the same principles on which they set out, and which are still maintained by the respondents.

But whatever difference in opinion may have happened, and whether the petitioners or the respondents had the right side of the question, and which the respondents hope is clearly in their favour, it is undeniable that the petitioners never were excluded by the respondents from attending this meeting-house; on the contrary, the seats which they formerly possessed were kept empty for them, although they paid no rent, for several terms after they withdrew; and if they please they may still have seats there, upon payment of rent, like the respondents, as formerly. But the real fact is in a manner admitted in the petition, namely, that the petitioners exclude themselves, and will not attend the same worship with the respondents and their minister, however much invited and pressed to it. Indeed nothing will perfectly satisfy them, unless they could still succeed in their former scheme of ejecting the respondents altogether.

And with regard to the petitioners expences and engagements,

ments, it appeared from a state given in to the former process, as taken from the managers books, and not then controverted, that the whole money contributed by the petitioners for buying the area, and erecting the house, only amounted to L. 18 : 9 : 2 ; that, on the other hand, the contributions then made by the respondents extended to L. 41, 4 s. 6 d. ; that the respondents had since paid debts contracted on that account, to the amount of L. 28 : 6 : 5 ; and that upon the repairs, new roof, and feu-duties, since the petitioners desertion, they had further expended L. 54 : 2 : 10. Thus the sums advanced on this subject by the respondents, according to the accounts kept, amounted to above L. 120 Sterling ; whereas the petitioners advances were no more than about L. 18, exclusive of some general collections at the meeting-house-door, where the contributions of particular persons could not be distinguished, but which, it is believed, bore still a far greater proportion on the side of the respondents.

So far, however, were the respondents from being desirous of reaping the least advantage at the petitioners expence, that they from the beginning offered to repay to them the sum that appeared to have been contributed by them ; though it had certainly been given in the way of a pure donation to a pious use, and not with a view of being repaid. They repeated that offer in the course of the former process ; and they here again renew it, upon condition of the petitioners conveying to them their interest in the subjects, and allowing them those expences which your Lordships have formerly, and may now award, on account of the vexatious processes in which these petitioners have so long involved them. And as to any engagement the petitioners stand under, it amounts to no more than this, that one of them, James Anderson, together with Alexander Greig, one of their adherents, stand bound with the respondents in a bill for two thirds of 100 merks due to

James Gardiner; and for relief of this, Mr Greig has kept more than the one half of the money in his own hands for upwards of ten years past; and the respondents have repeatedly offered to pay the debt; but Mr Gardiner being a favourer of the petitioners, refused to accept of it, and deliver up the bill.

With regard now to the *second* ground insisted on for the petitioners, namely, That they have a joint property in this subject, and therefore are in law intitled to have it divided, at least so as they may get the half of the value, upon making over their right to the respondents:

It is answered, *1mo*, That the sole foundation of the petitioners present claim, and interest, as laid and expressed in the libel itself, is no other than the above-mentioned incomplete tack and obligation intended to have been executed in the 1744. Now, as these deeds are the ground of their libel; and as, posterior to their raising it, they brought the other process upon the very same grounds, but instead of a sale, or a division, concluding, that the respondents should denude of the whole in their favour; and as it is proved by the extracted decree, that your Lordships found the said tack and obligation ineffectual, and assilzied the respondents; it is submitted, that it was a *res judicata* against the petitioners *quoad* the matter of the present process, which the petitioners had likewise totally deserted for ten years before.

2do, Supposing the petitioners might still revive and insist in this process, and support their libel upon different grounds than those expressed in it, it would have been proper for them to have amended it, and laid it upon the feudal right or disposition in favour of *Henry Belfrage* and *James Bogie*, as the only effectual deed respecting the subject in which any of them are interested. But in this view it is clear, that all the petitioners, excepting *Bogie*, fall to be thrown entirely out of the question. At the same time, were Mr Bogie here
insisting

insisting simply as a joint proprietor with Mr Belfrage, it is submitted to your Lordships, that as he does acknowledge that he received and held this right merely in *trust*, for the uses and purposes to which it has been, and still is, applied, he could not in justice be permitted to use that right *qua* proprietor, to the end of defeating entirely that trust, by either turning out the respondents from the possession of the house, or compelling them to pay him the half of the value, being a large sum of money, which he has no pretence to pocket; especially considering, that all he ever advanced was the merest trifle; and that the whole price of the purchase, building, &c. has been advanced by the respondents and others.

And, *3tio*, The respondents have no occasion to enter into a discussion of the petitioners arguments and authorities upon the point of law respecting the division of common property, or of things held in society, (which they apprehend does by no means apply), not only for the reasons above stated, but because Mr Bogie, the only one of the petitioners who has the least colour of title to insist in this process, did formerly make over to one of the respondents his right and interest in the subjects *qua* proprietor, by a deed of the following tenor, which was produced to your Lordships in the former process, and is *verbatim* ingrossed in the extract.

" 23d January 1762. I James Bogie tanner in Kinross, of
 " free will, without compulsion, resigns over to William
 " Beath dyer in Leslie my full power and right which I have
 " of the tenement of houses and yard, as they were purcha-
 " sed by the community of Leslie from John Ireland, to
 " which Henry Belfrage and me the said James Bogie was
 " legally infest as proprietors, by consent and agreement
 " of said community, which property of right as on my
 " behalf was granted, I hereby assign over to the said Wil-
 " liam Beath for ten years time; so that by virtue of this
 " my will and power he may act and do as shall seem most
 " for

“ for the good of the society presently possessed thereof; and
 “ also that me or my executors may have right thereto after,
 “ *if found to be followers of the present cause and testimony.*” On
 the back of which letter there is wrote and signed by the
 said William Beath what follows. “ This is my power and
 “ commission from James Bogie, which I have given over to
 “ Henry Belfrage of Wester Conland;” dated the 3d July
 1762.

It may perhaps be said, that this letter is not a very formal deed, and that Mr Bogie afterwards altered his opinion, and joined with the petitioners in the former process. But it is apprehended, that in a case so unfavourable upon the part of the petitioners as this certainly is, the letter must be held as sufficient to bar Mr Bogie from further disquieting the respondents, *and endeavouring to subvert the trust which he undertook*, at least during the term of years therein mentioned, as it clearly imports an absolute assignment of his right during that time. It can be of no consequence, that after granting and delivering the letter he was prevailed on by the petitioners to change sides, and declare in their favour; as he had it not thereafter in his power to recal the conveyance he had made, and which had by that time been produced in process.

Upon the whole, therefore, it is humbly hoped your Lordships will incline to adhere to this interlocutor, and thereby protect the respondents (who at least make four fifths of the original contributors and congregation) in that possession which they have held for above twenty years past, which they use conform to the original design, and which your Lordships formerly thought they ought still to continue.

In respect whereof, &c.

D A V. R A E.

